

ADMINISTRATOR'S MEMORANDUM

Transfer Processing No. 24

To: Water Management Division Staff

From: Gary Spackman ~~Karl J. Dreher and Norman C. Young~~

RE: **TRANSFER PROCESSING POLICIES & PROCEDURES**

~~(Interim Policies & Procedures Currently Applicable for Applications to Transfer Ground Water in the Eastern Snake River Plain Only)~~

Date: September 19, 2008 Draft ~~October 30, 2002~~

Add table of contents*****

The purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law. These policies and procedures are to be followed until rescinded or amended, or superseded by statute or rule or court decision, to assure that applications are processed efficiently and with consistency.

Regardless of whether or not an application for transfer is protested, Section 42-222, *Idaho Code*, requires that the department evaluate whether there would be injury to other water rights, there would be an enlargement in use of the original right, the proposed use would be a beneficial use, the proposed use would be in the local public interest, the proposed use would be consistent with the conservation of water resources within the State of Idaho, and whether the proposed change would impact the agricultural base of the local area. In the case where the place of use is outside of the watershed or local area where the source of water originates, the department must also evaluate whether the change would adversely impact the local economy of the watershed or local area. The department must also evaluate the validity of the right (or part thereof) being changed and must assure that the applicant owns the right or otherwise has the authority to apply for the transfer.

1. When a Transfer is Required.

Section 42-222, *Idaho Code*, requires the holder of a water right to obtain approval from the department prior to changing: (1) the point of diversion, (2) the place of use, (3) the period of use, or (4) the nature of use of an established water right. An established water right is a licensed right, a decreed right, or a right established by diversion and beneficial use for which a claim in an adjudication or a statutory claim has been filed. Approval is sought by filing an application for transfer with the department.

Changes to Elements of a Water Right. An application for transfer is required if a proposed change would alter any of the four elements of the water right listed above that can be changed pursuant to Section 42-222, *Idaho Code*, as recorded with the department or by decree. If a proposed change has the potential to injure other rights or the potential to enlarge the right, even when there would be no change in any of the recorded elements of the right, an application for transfer should be filed to provide for evaluation of injury and enlargement issues before the change is made. For example, if the point of diversion from a fully appropriated creek is proposed to be moved where additional water would be available for diversion or if the proposed point of diversion as changed would move upstream of the points of diversion for other rights, the change can not be made unless other conditions are imposed, such as mitigation, to prevent injury. As another example, a proposed change of use under a water right for an industrial use, which includes a limitation on the quantity of water that can be consumptively used, to a different industrial use that would increase the quantity of water that would be consumptively used can not be made unless enlargement is prevented.

Changes in Consumptive Use. Unless there is a specific condition of the water right limiting the amount of consumptive use, the amount of consumptive use of water under a water right is not an element of the water right, and changes in water use under a water right for the authorized purpose of use that simply change the amount of consumptive use do not require an application for transfer provided that no element of the water right is changed, ~~and there is no potential for injury or enlargement.~~ However, when determining the amount of water that can be transferred pursuant to an application for transfer proposing to change the nature or purpose of use, and for certain other circumstances as described herein, historical consumptive use is considered.

Changes to Points of Diversion. If a point of diversion is proposed to be moved to a different tract than described as an element under an established water right, then a transfer application is required. This includes a change from one 10-acre legal subdivision to another if the point of diversion has been previously described as a 10-acre legal subdivision (If within a 10-acre legal subdivision, a transfer may be required if moving the point of diversion will bypass another point of diversion or result in a well significantly closer to another well or surface water source). An application for transfer is also required when a point of diversion is proposed to be added for a water right, even when the existing authorized point of diversion is recorded as a 10-acre legal subdivision and the additional diversion would be within the same 10-acre legal subdivision.

If a point of diversion is proposed to be moved from a tributary to a location downstream from the confluence of the tributary and the surface water stream to which the tributary is joined, then an application for transfer is required. If a point of diversion is proposed to be moved from a stream to the stream to which it is tributary at a location upstream of the confluence between them, or moved from one tributary to another tributary, an

application for exchange is required pursuant to Section 42-240, *Idaho Code* rather than an application for transfer.

Changes in Place of Use. An application for transfer is required if a change in the location of use between 40-acre legal subdivisions is proposed that would result in a change in the number of acres within a 40-acre subdivision or in use of water at a new 40-acre subdivision that is not included within the recorded place of use element for the right. An application for transfer is also required for a proposed change in location of use under a water right for irrigation to a location outside of prescribed boundaries such as those provided under Sections 42-219, Idaho Code, with or without a proposed change in purpose of use, ~~where the place of use is defined as an area within prescribed boundaries or by a GIS "shape file," except for those rights held by irrigation districts or, municipal providers, and others included under the provisions of Sections 42-202B or 42-219, Idaho Code,~~ even when the change in location would be included within the same 40-acre legal subdivisions existing prior to the proposed change. A proposed change to any water right held for irrigation involving a change in the number of irrigated acres of less than one acre at the original place of use or at a proposed new place of use is not approvable unless the proposed change involves a new purpose of use within the original place of use or the applicant provides a verification procedure approved by the Director that can be practically administered to prevent injury or enlargement.

Consolidation of Acreage. An application for transfer is required for proposed consolidation of water use for irrigation by permanently reducing the number of acres authorized for irrigation under a water right, while maintaining the original diversion rate or annual diversion volume.

Land Application of Wastewater. An application for transfer is required for a proposed change in the place of use under a water right for uses such as industrial use, dairy use, or confined animal feeding operations that would allow land application of wastewater from that use or change the location of lands used for application of wastewater, ~~except for wastewater from non-industrial uses when there is not a full existing water right for irrigation of the place of use receiving wastewater. The exception provided here effectively revises the guidance to staff for filing requirement to file an application for transfer as provided in~~ See Application Processing Memorandum No. 61 ~~for additional information concerning wastewater from industrial uses.~~

Correction of Errors. An application for transfer may also be required to correct errors in licenses or decrees. For example, a transfer application may be required to correct the location of the place of use of a water right decreed by a court if the decree is later determined to be in error. However, a transfer action is not always required to correct such errors. For example, if a water right claim is determined to be in error, the claim can be amended to correct the error. Similarly, some clerical errors in a license or decree may be corrected by issuance of an amended license or decree (by the jurisdictional court) without using the transfer process. Also, a change to a description of the location of the place of use or point of diversion, as used by the Department for administration of water rights, resulting from improved methodology does not require an

application for transfer, as described below. In addition, conditions that are no longer applicable may be modified or removed from a license without a transfer, provided other rights are not materially affected. For decrees, conditions that are no longer applicable should be noted in comments on the Department's electronic record for the right. However, a change to any element of a decreed water right requires filing an application for transfer, unless the appropriate court makes the change by amending the decree.

2. When a Transfer is not Required.

An application for transfer is not required if a proposed change will not alter any of the elements of a water right as licensed or decreed, except that even when the recorded elements of a water right are not changed an application should be filed under such circumstances described in Section 1 above. In addition, an application for transfer is not needed when an accomplished change to a water right or an enlargement of a right has been claimed in an adjudication in accordance with the provisions of Sections 42-1425 or 42-1426, *Idaho Code*.

Change in Ownership. An application for transfer is not required to change the owner of record for a water right or address of record for a right holder. Changes in ownership or address are to be filed in accordance with Section 42-248, *Idaho Code*, or for adjudication claims in accordance with Section 42-1409(6), *Idaho Code*. However, a transfer application filed pursuant to Section 42-222, *Idaho Code*, accompanied by evidence documenting a change in ownership for a water right, or showing a change in the address of the owner of a water right, satisfies the requirements of Section 42-248, *Idaho Code*.

An application for transfer is not required to change the owner of record of one or more water rights, or portions thereof, that are part of a larger group of water rights authorized for use within and appurtenant to a permissible place of use if the conveyance documents provide evidence of the change in ownership and appurtenance of each of the rights and if other elements of the rights will not be changed.

An application for transfer is not required to eliminate one or more points of diversion authorized under a water right through a change in ownership if the conveyance documents provide evidence of the limitation and if other elements of the rights will not be changed.

Partial Relinquishment of Portions of Right(s). An application for transfer is not required to relinquish a portion of a water right such as elimination of a purpose of use or a point of diversion or a reduction in water uses, rate or, acres, or points of diversion. The water right owner should provide a notarized statement of relinquishment including specific identification of the water right(s) and the specific reduction(s).

Split Rights. An application for transfer is not required when a water right for irrigation is proposed to be split, with notice to the department pursuant to the provisions of Section 42-248, *Idaho Code*, such that a disproportionate per acre share of the right would be

conveyed to another party provided that the resulting diversion rates do not exceed 0.02 cfs per acre, the amount of water historically applied per acre, or the amount of water diverted at a particular point of diversion, whichever is greater, for that part of the right conveyed or retained, and provided no other changes are made.

Replacement of Point of Diversion. An application for transfer is not required to replace a point of diversion if the new point of diversion is constructed at the same location as described in the license or decree for the water right, and the change will not injure other rights.

Refined Descriptions. An application for transfer is not required when a change in the description of the location of the point of diversion or place of use is only the result of improved methodology for referencing and displaying the location, which results in a more accurate description of the same physical location. The department will not initiate an enforcement action against the water right owner due to the discrepancy between the water right record and the referenced location if the discrepancy is created by better methodology and is not due to a change in the physical location. However, if the water right owner wishes to correct the water right record, an application for transfer or an appropriate amendment will be required, as previously described for correction of errors.

Generally Described Place of Use. As provided in Section 42-219, *Idaho Code*, an application for transfer is not required to change the place of use within a generally described place of use. A generally described place of use may be by court decree or as provided in Section 42-219(5) and (6). Pursuant to Section 42-219(7), any change within a generally described place of use can not result in an increase in the diversion rate, or in the total number of acres irrigated under the water right, and can not cause injury to other water rights. Any change to the boundaries of a generally described place of use requires an application for transfer, except for a municipal provider as described below or for an irrigation district where changes in boundaries must be documented by a map of the revised boundaries filed with the department in accordance with Section 43-323(2), *Idaho Code*.

Municipal Places of Use. An application for transfer is not required to change or add a place of use for “municipal purposes” within the “service area” of a “municipal provider.” See Sections 42-202B and 42-222(1), *Idaho Code*, for appropriate definitions and provisions governing use of municipal water rights. The ownership of a portion of a municipal water right held by a municipal provider for reasonably anticipated future needs can be changed to a different municipal provider subject to the provisions of Section 42-248, *Idaho Code*. However, the right can not be changed to a place of use outside the service area of a municipal provider or to a new nature of use, and an application filed for such a change is to be returned together with any associated application fee.

In-stream Stock Watering. An application for transfer is not required to divert water away from a stream for stock watering purposes provided the diversion is added and used in conjunction with an in-stream stockwater right and provided the diversion meets

certain conditions pursuant to Section 42-113(3), *Idaho Code*. See guidance memorandum for in-stream stock diversions dated June 26, 2000, for additional information.

Intensified Use of Water. An application for transfer is not required to increase production under an authorized use of water, unless the proposed change would also result in a change to one or more of the elements of the water right(s) as licensed or decreed. For example, an application for transfer is not required to increase the number or volume of raceways in a fish propagation facility, increase the number of cows at a dairy, change irrigation to a more water consumptive crop, or increase the generating capacity of hydroelectric generators, so long as none of the elements of the associated water rights are changed.

Mitigation Through Non-Use of a Right. An application for transfer is not required to mitigate for the diversion and use of water under a new appropriation if the mitigation is accomplished through non-use of water under an existing valid water right. The mitigation plan must be approved by the department as part of the new appropriation.

3. Requirements for an Acceptable Application for Transfer.

The department is a public service oriented agency, and department employees traditionally have helped applicants complete transfer application forms. The existing transfer backlog, together with the increasing number and complexity of new applications for transfer, requires that staff focus their time on processing existing acceptable applications. Department employees are encouraged to provide general assistance to applicants but should refrain from completing application forms on behalf of applicants.

An applicant or qualified consultant must prepare and submit an application for transfer in accordance with the minimum requirements enumerated below to be acceptable for initiating the processing of the application by the department. An application that does not comply with these minimum requirements is to be considered incomplete and is to be returned to the applicant along with a letter or checklist identifying the deficiencies. The letter shall state that unless the application is resubmitted within 30 days of its return, the application fee will be refunded upon written request. An application for transfer that satisfies the minimum requirements will be processed in accordance with Section 5, Information Needed to Complete Processing of a Transfer Application.

- (1) Application Forms. An application for transfer must be submitted on a current form provided by the department entitled, "Application for Transfer of Water Right." ~~An electronic version of t~~The current form is ~~can be used, such as the form available from the department's Internet homepage at:~~

- (2) Name and Address. An application for transfer must include the name and address of the applicant. In addition, the application must include the name and address of any new right holder(s) for the water rights (or parts thereof) being transferred, if different than the applicant. The applicant's name must match the department's current record of ownership for the water rights (or parts thereof) being transferred. Otherwise, adequate documentation must be included to show that a change in ownership or authority to make the change has legally occurred. Adequate documentation can be a warranty deed, title policy, contract of sale or option for purchase by applicant (if the contract or option allows the transfer), or other similar document confirming ownership of the water right(s) or the authority to change the water right.
- (3) List of Water Rights to be Changed. An application for transfer must list all water rights for use in a common system of diversion and distribution for which the point of diversion, place of use, period of use, or nature of use are proposed to be changed (the water rights to be transferred). A proposed change, which involves separate diversion and distribution systems, must be filed as separate applications. A proposed change to the remaining portion of an existing water right subsequent to a proposed transfer requires a separate application for transfer.
- (4) Associated Water Rights or Water Supply. The application must include a separate list of individual water rights, other than those proposed to be changed, and a description of water supplied by a canal company, irrigation district, or municipality, that provide water currently used in the same diversion system or at the same place of use as the right(s) proposed to be transferred (associated water rights or water supply). In addition, the application must include a separate list of associated water rights or water supply proposed to be used in the same system or at a new place of use. If the associated water rights or water supply are not owned by the applicant and changes to conditions for those rights are necessary, documentation must be submitted confirming that the applicant has the legal authority to make such changes on behalf of the current owner of the other rights.

Changes to conditions or remarks for associated water rights that are necessary as a result of an approved transfer and that do not affect the rights of other persons or entities can be made without a separate transfer application or process. Such changes usually result from a division in ownership and should be included in the transfer approval document.

- (5) Reason for Change. The application must list the purpose for and a general statement of the reason for the proposed change.
- (6) Description of Proposed Change. The application must describe in writing the proposed changes, which must include the following:
- a. The right number(s) assigned by the department for the right(s) proposed to be changed must be identified. If the right was established by a beneficial use for which a claim has not been filed, a claim must be filed before or together with the transfer application. If the right is represented by a decree and the department has not assigned a number to the right, a copy of the decree must be included with a description of the right that is proposed to be changed.
 - b. The amount of water proposed to be diverted, as a rate of flow in cubic feet per second and as acre-feet per year, if the transferred water right has a volume limitation, for natural flow and ground water rights must be set forth. The amount of any stored water involved in a transfer must be identified in terms of acre-feet per year for each purpose of use listed.
 - c. The proposed nature or purpose of use must be stated. For ~~non-irrigation~~ proposed uses such as "industrial" or "commercial," a more detailed description of the proposed use(s) must be provided under the "Remarks" section of the application, or as an attachment to the application. For applications proposing to change the nature of use to municipal purposes for reasonably anticipated future needs (RAFN), the applicant shall provide information to establish that the applicant qualifies as a municipal provider and that the RAFN, service area, and planning horizon are consistent with the definitions and requirements specified in Section 42-202B, Idaho Code.
 - d. The period of each year during which water is proposed to be diverted, or diverted and stored, and beneficially used must be set forth for each use listed.
 - e. The source of water for the proposed changes must be listed. An application proposing a diversion, injection, and re-diversion of water must list the source for the original diversion as the source for the injection and re-diversion. An application proposing to change the source from ground water to surface water or from surface water to ground water shall include an analysis confirming a direct and immediate hydraulic connection (at least 50 percent depletion in original

source from depletion at proposed point of diversion in one day). See Section 5c.(6) for further details.

- f. The legal description of the point(s) of diversion must be described. The description must be to the nearest 40-acre subdivision or U. S. Government Lot of the Public Land Survey System. ExistingThe point(s) of diversion should be described to the nearest 10-acre tract, if based on a previously recorded 10-acre description or other accurate means such as GPS or a detailed and accurate map. Proposed point(s) of diversion need only be described to the nearest 40-acre tract. The location of springs must be described to the nearest 10-acre tract. Subdivision names, lot and block numbers, and any name in common usage for the point of diversion should be included in the "Remarks" section of the application form.
- g. Except as provided herein, the legal description of the place of use must be set forth to the nearest 40-acre subdivision or U. S. Government Lot of the Public Land Survey System. Subdivision names, block and lot numbers, and any name in common usage for the place of use should be included in the "Remarks" section of the application form. For water rights held by irrigation districts, municipal providers, and others included under the provisions of Sections 42-202B or 42-219, *Idaho Code*, the place of use may be generally described even if previously described to the nearest 40-acre subdivision or lot.
 - i. If irrigation is a purpose of use, the number of acres in each 40-acre tract of the place of use or within a generally described place of use must be shown. The location of uses, other than for municipal providers or for irrigation, must be identified in the appropriate 40-acre tract(s).
 - ii. ~~Except for wastewater from non-industrial uses when there is a full existing water right for irrigation of the place of use receiving wastewater, if a proposed change includes disposal or use of wastewater by land application to growing crops the application must identify the location of the waste disposal area by legal description under the use from which the wastewater originates.~~
- h. An adequate description of the proposed diversion, delivery, and application system(s), ~~and measuring devices~~ must be

provided. This ~~may~~should include preliminary sizes and dimensions of pumps, pipelines, headgates, ditches, dams, impoundments, and application equipment. The type and location of measuring devices might also be required for applications providing for measurement of water to address specific injury or enlargement concerns ~~must also be provided~~. For large existing systems, such as those owned by municipal providers, irrigation districts, and canal companies, only those features proposed to be added or modified need to be described.

- (7) Map of System. A map corresponding to the written description above must be included showing the location of points of diversion, reservoirs, dams, canals, ditches, pipelines, and other works proposed to be used in the diversion and conveyance of water. The map must clearly show the location of the place of use including lands to be irrigated, if any. If only a part of the water right(s) is proposed to be changed, the map must include the location of the part of the existing recorded right(s) proposed to be removed (or changed). Legal descriptions including townships, ranges, sections, quarter-quarters, and government lots must be evident or labeled unless other reference information is evident on the map to identify the specific location. In lieu of creating a map, a copy of a published map, such as a U. S. Geological Survey quadrangle map, or an aerial photograph, can be attached to the application with the required identification shown thereon. For large existing systems, such as those owned by municipal providers, irrigation districts, and canal companies, only those features proposed to be added or modified need to be shown.
- (8) Response to Questions on the Form. The application for transfer must include responses to the questions on the application form concerning the validity of the right, the proposed use of the land from which the right is proposed to be removed (if applicable) and the existence of mortgages or liens. In addition, the application should address any agreements or commitments not to divert water under the right(s) proposed for transfer such as a lease to the water supply bank (WSB), enrollment in the federal Conservation Reserve Enhancement Program (CREP) or dedication of the right(s) for mitigation purposes.
- (9) Changes to Part of a Right. If only a part of a right is being changed, the application for transfer must define that part by describing each of the elements, as currently licensed or decreed or otherwise recorded, for the part of the right being changed.
- (10) Signature. The application for transfer must include the ~~notarized~~ signature of the applicant or the applicant's authorized representative. If a representative signs the application, evidence of authority to sign for

the applicant must accompany the application. An application in more than one name must be signed by each applicant unless the right is held in the name of one joint owner "or" other joint owner(s), or the right is held in the name of one joint owner "and/or" other joint owner(s).

- (11) Filing Fee. The filing fee provided in Section 42-221, *Idaho Code*, must be submitted with the application for transfer. If the applicant is a governmental agency, a purchase order for the required amount is acceptable. (See the memorandum titled "Guidance on SB 1337 Amending Section 42-221, I.C.," dated June 26, 2000, and Transfer Processing Memorandum No. 23 for further guidance on application fees.)

- (12) Changes to Point of Diversion from Eastern Snake Plain Aquifer. Except as provided below, if the application for transfer proposes to move the point of diversion for a water right to divert and use ground water from one location to another within the Eastern Snake Plain Aquifer (ESPA) including any modeled tributary aquifers, the applicant must submit an attachment to the application that sets forth the time history of calculated depletions (transient to steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA using or based on the department's current ground water model for the ESPA, or other equivalent analysis acceptable to the department. When using results from or based on the department's ground water model, the time history of calculated depletions must be for the cells containing the points of diversion both before and after the proposed transfer, if different. A copy of the department's ESPA ground water model, or associated transfer spreadsheet can be obtained by contacting the department or visiting the department's web site.

- ~~(12) Changes to Point of Diversion from Eastern Snake Plain Aquifer. Except as provided below, if the application for transfer proposes to move the point of diversion for a water right to divert and use ground water from one location to another within the Eastern Snake Plain Aquifer (ESPA), the applicant must submit an attachment to the application that sets forth the time history of calculated depletions (transient to steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA using or based on the department's current ground water model for the ESPA, or other equivalent analysis acceptable to the department. When using results from the department's ground water model, the time history of calculated depletions must be for the cells containing the points of diversion both before and after the proposed transfer, if different. The most current response functions from the ground water model must be used, which as of the date of this memorandum can be obtained by contacting Dr. Donna M. Cosgrove (at cosgrove@if.uidaho.edu) and then manipulating the "Eastern Snake~~

River Plain Hydrologic Effects Spreadsheet," which can be downloaded from the following web site:

(13) —

<http://www.if.uidaho.edu/~johnson/ifiwrri/effects.html>

Alternatively, a copy of the department's ESPA ground water model can be obtained by the applicant and used by a qualified person to directly calculate the time history of depletions. A copy of the current ground water model can be obtained by contacting Mr. John Lindgren at jlindgren@idwr.state.id.us.

The purpose of this attachment is to provide a basis for evaluating whether the proposed transfer will increase depletions to hydraulically-connected reaches of the Snake River. Increases in such depletions are presumed to cause injury to existing water rights because all of the hydraulically-connected reaches of the Snake River (including tributary springs) have water rights that are not fully satisfied at certain times. Absent an analysis of injury, increased depletions greater than 2 acre-feet per trimester per reach must be mitigated (within 5 percent for transient and steady-state increases in depletion, reflecting the confidence intervals for the ground water model) for the proposed transfer to be approvable, assuming the other criteria set forth in Section 42-222, *Idaho Code*, can be satisfied. If mitigation for the proposed transfer is proposed by the applicant, which consists of reduced ground water withdrawals, then any proposed schedule for adjusting reduced withdrawals must also be set forth in the application for transfer.

If the application for transfer proposes to move or add a point of diversion within or adjacent to the model cell for the existing point(s) of diversion the existing place of use for the water right, the attachment described above is not required when the application is submitted. However, if the department determines that the proposed change may increase depletions to a hydraulically-connected reach of the Snake River (including tributary springs), the attachment will be required to complete processing of the application for transfer. See the Department's August 13, 2007 memo entitled, "ESPA Transfer Spreadsheet Version 3.1 – Implementation and Use" for further guidelines on use of the ESPA transfer spreadsheet.

- (13) Historic Beneficial Use. If the application for transfer proposes to change the nature or purpose of use or the season of use, or for a supplemental water right, the place of use, the applicant must include an attachment documenting the historic extent of beneficial use under the right. For a transfer seeking to change a water right from irrigation, the attachment must provide sufficient data and information to determine historic consumptive water use. This can be satisfied by

submitting records of cropping pattern or rotation, or records of water diverted and system efficiency, for at least the most recent, five consecutive years as described in Sections 5d.(5) and (6). If the application for transfer proposes to change the place of use for a supplemental water right, the applicant must include information to demonstrate that enlargement of the supplemental right will not occur.

- (14) Electronic Shape Files or Photographs Documenting Place of Use Changes. If the application for transfer proposes to change the purpose of use for a water right from irrigation to another use, or change the place of use for a water right for irrigation to another location, either of which requires the drying up of acres at the original place of use, the applicant must submit an attachment to the application for transfer. The attachment must provide a clear delineation of the location and extent of the irrigated acres prior to the proposed transfer, and must also provide a clear delineation of the location and extent of the irrigated acres, if any, after the transfer, if it is approved. This attachment may either consist of two electronic shape files in a format that is compatible with the department's GIS system or ~~two~~ aerial photographs of sufficient detail acceptable to the department with the boundaries of the irrigated areas clearly shown and referenced to the Public Land Survey System. ~~Applications for transfer proposing to move irrigated acres to another location must submit an attachment that provides a clear delineation of the location and extent of the irrigated acres prior to the proposed transfer at the proposed new place of use, if any, and the location and extent of the irrigated acres at the new place of use after the transfer, if it is approved. This attachment may also consist of either two electronic shape files in a format that is compatible with the department's GIS system or two aerial photographs of sufficient detail acceptable to the department with the boundaries of the irrigated areas clearly shown and referenced to the Public Land Survey System.~~ If a place of use involved with the application for transfer currently consists of a permissible place of use or a generally described place of use (see 3(6)g above), then the applicable attachment is not required provided the application contains a clear statement that the boundaries for that permissible place of use are not proposed to be changed by the transfer and the total number of irrigated acres within that permissible place of use before and after the transfer is clearly set forth.

- (15) Applications Involving Water Rights for~~Based Upon~~ Domestic Purposes Exemption. ~~If a~~An application for transfer involving ~~multiple one or more~~ water rights having priority dates of March 25, 1963, or later, that relied on the domestic exemption set forth in Section 42-227, *Idaho Code*, for domestic purposes as defined in Section 42-111, Idaho Code, even when evidenced by a decree, that proposes to establish a use, which itself would not be included within the scope of the definition for domestic purposes in Section 42-111, *Idaho Code*, is not approvable.

Idaho Code specifically prohibits the diversion and use of water under a combination of one or more exempt, domestic uses to provide a supply of water for a use that does not meet the exemption of Section 42-227, *Idaho Code*, and is required to comply with the mandatory application and permit process for appropriating a right to the use of water pursuant to Chapter 2, Title 42, *Idaho Code*. An application for transfer filed for such a change is to be returned together with any associated application fee submitted.

4. Changes to Applications for Transfer.

Amendment of Application. An applicant may revise or amend an acceptable application for transfer to clarify or correct information on the application. Significant changes to the place, period, or nature of the proposed use, amount of water, method or location of diversion, or other substantial changes from those shown on a pending application for transfer, will require filing a new application for transfer to replace the original application. If the revisions are not substantial, the application may be revised or amended with an initialed, dated endorsement by the applicant, or by the applicant's representative, on the original application, or by a notarized letter describing the amendments in sufficient detail. Changes initialed or signed by the applicant's representative must be accompanied by evidence providing authority to sign for the applicant if not previously provided. Changes to the application or supporting information are not to be made by staff under any circumstances. A replacement application must be identified as "changed," "amended" or "revised" on its face so that it can be distinguished from the original application, and the original application must be marked as "superseded." An additional filing fee may be required if the revised or replacement application involves more water than proposed in the original application for transfer. A re-advertisement fee, as provided in Section 42-221F, *Idaho Code*, will be required if notice of the original application has been published and changes to the original application are significant and warrant re-notice. (See Transfer Processing Memorandum No. 20 for additional information regarding changes to applications.)

Assignment of Application. An applicant may assign, in writing (must be notarized), an application for transfer to another entity while the application is pending before the department. An assignment does not require additional notice of the application to be published, and there is no fee for an assignment of an application. The assignment will change the name of the transfer applicant, but ownership of the water right(s) involved in the transfer cannot be changed without proper notice and documentation. Section 42-248, *Idaho Code*, provides that a transfer application can substitute for a notice of change in water right ownership if adequate documentation is provided with the application.

5. Processing an Application for Transfer Prior to Hearing.

Processing of an application for transfer consists of the ~~following steps:~~ outlined below. Flexibility is provided for some steps with the intent to streamline or expedite processing of routine or non-complex applications. Regional Managers have been delegated authority to sign routine water right approvals and denials and should continue to implement their signature authority as outlined in the Department's June 7, 2007 memo entitled, "Delegation of Authority for Water Right Approval/Denial."

- (1) Initiating Processing – Data Entry. Once an application has been accepted and the application fee receipted pursuant to Section 3, Requirements for an Acceptable Application for Transfer, the Regional Office shall complete data entry of the basic information contained in the application and initiate working in parallel with the State Office to process the non-routine or complex application's.
- (2) Additional Information~~Parallel Processing.~~ For those applications to be processed in parallel~~Working in parallel,~~ the Regional Office and the State Office will determine what, if any, additional information is necessary to complete or supplement the application, ~~and~~ For all applications, the Regional Office will correspond with the applicant to obtain the additional information, obtain watermaster recommendation as described below, and as well as perform any field review that is also necessary in coordination with staff from the Adjudication Bureau if the water right is claimed in a pending adjudication.
- (3) Administrative, Hydrologic, and Legal Review. For those applications to be processed in parallel, ~~The~~ Regional and State Offices will complete a review of all information submitted, in coordination with the Adjudication Bureau as needed, and forward appropriate information to the Hydrology Section and Administration for additional hydrologic, policy, and legal review as necessary.
- (4) Preparation of Staff Memorandum. Once the review is complete, the Regional Office will prepare a memorandum, with the concurrence of the State Office, if necessary for parallel review, ~~and using the department's computerized Work Flow process,~~ that documents the joint-review and evaluation ~~by the Regional and State Offices~~ of the sufficiency of the information submitted and whether processing of the application can continue because there is no clear inconsistency with the criteria set forth in Section 42-222, *Idaho Code*. If it is determined that processing of the application can continue, the Regional Office will complete necessary GIS descriptions, finalize data entry, and draft conditions for entry into Work Flow.
- (5) Rejection or Denial of Application. If it is determined that the application for transfer should be rejected or can not be approved pursuant to Section 42-222, *Idaho Code*, the Regional Office or State Office (for parallel review) will prepare and issue a preliminary order rejecting or denying the application. An

application for transfer is to be rejected if the applicant fails to provide additional or adequate information pursuant to the requirements in this Section 5. An application for transfer that clearly does not meet the criteria set forth in Section 42-222, *Idaho Code*, must be denied. A rejected application may be re-filed when adequate information can be provided; a denied application can not generally be re-filed for substantially the same proposed transfer, unless a showing is made that substantial changes have subsequently occurred such that the criteria set forth in Section 42-222, *Idaho Code*, can potentially be satisfied. In either case, application fees will be retained. Note that notice of a rejected or denied application shall be sent to the applicant by certified mail pursuant to Section 42-222, *Idaho Code*.

- (6) Applicant Contest of Rejection or Denial. If the applicant contests the preliminary order rejecting or denying the application and requests a hearing pursuant to Section 42-1701A, *Idaho Code*, the Regional Office will provide notice of the application for transfer pursuant to Section 42-222, *Idaho Code*, including notice of the contested case, and provide opportunity to protest the application and intervene in the contested case unless notice is not required for the application as described below.

- (7) Public Notice. If it is determined that processing of the application can continue consistent with the criteria set forth in Section 42-222, *Idaho Code*, the Regional Office will provide notice of the application for transfer pursuant to ~~Section 42-222, *Idaho Code*~~ unless notice is not required pursuant to Section 42-222, *Idaho Code*. The department has discretion to provide notice as deemed appropriate for applications proposing to change only the point of diversion or place of use in a manner that will not change the effect on the original or hydraulically-connected source or affect other water rights.

The timing of the public notice in these steps should remain flexible in order to streamline or expedite processing of the application. For example, processing time may be reduced by preparation of draft documents during the notice period. However, notice should not be provided prior to determining that the application meets the minimum requirements described in Section 3 and that there is a clear understanding by staff regarding the purpose of the transfer. Premature notice could result in the requirement to republish notice due to changes to an application or could result in unnecessary publication costs where an application is likely to be rejected or denied.

- (8) Preparation of Approval Document. If no protest to the application for transfer is filed under step (7) above, or all protests filed are withdrawn prior to hearing, the Regional Office will finalize an electronic approval document and issue an approved transfer, subject to appropriate conditions, as a preliminary order and complete data updates in Work Flow. For those applications processed in parallel, the Regional office will finalize an electronic approval document and forward the document to the State Office for final approval and data updates. ~~The State Office will issue an approved transfer, subject to appropriate~~

conditions, as a preliminary order. ~~The State Office will also complete data updates in Work Flow.~~

- (9) Contested Case Proceedings. If protest to the application for transfer is filed under either step (6) or (7) above, a contested case process will be completed. The hearing officer will forward electronically any final order that results from the contested case to appropriate staff to ~~and the State Office will complete data updates in Work Flow.~~

Gathering Information Needed for Processing. In completing the steps outlined above, additional information may be needed for clarification of the purpose and intent of the proposed change, to further document the information on the application, or to provide a sufficient basis for determining whether the proposed change satisfies the statutory criteria for approval. **The burden of providing sufficient information is borne by the applicant.** However, staff should locate and assemble information available in the department's records that does not require compilation, interpretation, or analysis by an engineer, geologist, or other technical specialist.

Requests for Additional Information. Correspondence shall be prepared requesting any additional information needed and providing a reasonable period of time for response (generally 30 days). When additional information is requested from the applicant, the applicant shall be informed of the need for a timely response to avoid delays in processing. The applicant shall also be informed that the application may be rejected if the additional information requested from the applicant is not timely received or is inadequate. The department can grant additional time to submit the required information if the applicant submits a written requests for additional time and sufficient justification is provided.

Watermaster Recommendation. Section 42-222, *Idaho Code*, requires that the department shall advise the watermaster of any water district in which the water is used of any proposed change. The department shall not take final action on an application for transfer until the watermaster's recommendation has been received and considered.

Delays or non-response from watermasters results in delays in processing applications. The watermaster shall be informed ~~If the watermaster does not respond to the department's initial request for a recommendation, a second request should be sent seeking a recommendation and informing the watermaster that a non-response will be considered by the department to be the watermaster's recommendation not objecting to approval of the proposed transfer. Department staff should ensure that all watermasters understand their responsibility to provide recommendations.~~

Staff to Exercise Judgement. **Department staff has discretion to adapt the requirements set forth herein according to the nature and complexity of a proposed transfer.** While it is important that the information and documentation requirements are consistently applied, **staff is to use sound judgement to avoid asking the applicant for unnecessary information or seeking unnecessary review**

and comment from other state or local governmental entities as these guidelines are applied.

5a. Evaluation of Authority to File an Application for Transfer.

- (1) Presumption Based Upon Department Ownership Records. For any application for transfer, the department must have sufficient information to determine that the applicant has the authority to seek the proposed change in use of the water right(s). The department can presume, absent information to the contrary, that the applicant is the owner of the right(s) if the department's ownership records maintained pursuant to Sections 42-248 or 42-1409(6), *Idaho Code*, list the applicant as the current owner. The department may need to seek documentation regarding ownership if there is reason to believe that the department's ownership records may be inaccurate.
- (2) Other Acceptable Documentation. If the applicant's name does not match the name in the department's records for the current owner of the right(s) sought to be transferred, the applicant must provide evidence of current ownership or authority to make the proposed change(s). Adequate documentation can be a warranty deed, title policy, contract of sale or option for purchase by applicant (if contract or option allows the transfer), or other similar document confirming ownership of the water right(s).
- (3) Applicant Does Not Own New Place of Use. If the application for transfer proposes to change the place of use authorized under the water right(s), and the applicant does not own the land at the proposed new place of use, then the applicant must provide documentation that authorizes the change on behalf of the current owner of the proposed new place of use, except when the applicant is a municipal provider, irrigation district, canal company, or other similar entity. Such entities may only need to provide evidence of their authority to provide water for the proposed place of use in instances where evidence of such authority is necessary.
- (4) Conditions on Associated Rights. If an application for transfer proposes a change from or to a system where there is an associated water right that is not listed on the application as a right being transferred, a change to conditions for that right is required (other than changes to conditions resulting from an ownership split), and the right is not owned by the applicant, then the applicant must provide documentation authorizing the change on behalf of the current owner of the associated right.
- (5) Authority to Sign on Behalf of an Applicant. If the application for transfer is signed by someone other than the applicant(s) as listed on

the application, documentation is needed to establish that the signatory is a representative of the applicant and is authorized to sign on the applicant's behalf. The documentation can be a copy of a current "power of attorney" authorizing signature on behalf of the applicant, or other similar documentation. An application could also be signed by an officer of a corporation or company, an elected official of a municipality, or any individual authorized by an organization to sign the application for a corporation, company, or municipality (if accompanied by documentation confirming authorization). The signatory's title must be shown with the signature.

- (6) Corporation, Partnership, Joint Venture, or other Business Entity. If the application for transfer is in the name of a corporation, partnership, joint venture, or other business entity, department staff must verify that the entity has filed with the Idaho Secretary of State is authorized to do business in the State of Idaho by completing a Business Entity Status Search at: <http://www.idsos.state.id.us/>. If the Business Entity Status Search does not confirm that the corporation, partnership, joint venture, or other business entity is properly registered authorized to do business in the State of Idaho, department staff is to request further clarification from the applicant. The intent of this search is to ensure that the business entity is properly identified, including identification of individuals with signature authority and responsibility for business activity. Department staff may utilize other available resources to obtain the necessary information.
- (7) Approval of Irrigation Entity or Legislature. Section 42-108, *Idaho Code*, requires that if the right(s), diversion works, or irrigation system is represented by shares in a corporation, or owned by an irrigation district, no change can be made without the consent of such corporation or irrigation district. This includes the use of such right(s), diversion works, or irrigation system for mitigation purposes related to a proposed transfer. Any permanent or temporary change in period of use or nature of use, in or out-of-state, involving a quantity of water greater than fifty (50) cfs or a storage volume greater than five thousand (5,000) acre-feet must also be approved by the legislature if approved by the department, except that any temporary change within the State of Idaho for a period of less than three (3) years does not require legislative approval.
- (8) Liens, Mortgages, or Contract Restrictions. The department is required to provide notice to the holder of a security interest in any water right(s) proposed to be changed if the security interest holder has filed a request for notice pursuant to Section 42-248(6), *Idaho Code*. If the transfer proposes a change that might impact the value of the land such as moving the place of use or diversion facility to other land or changing the nature of use and if the land from which the water right is proposed

to be transferred is subject to liens, mortgages, or other contract restrictions affecting the right to transfer the water, a notarized statement or a statement on official letterhead signed by an authorized representative of a mortgage company or similar entity is required from the holder of each such lien, mortgage, or contract (see Transfer Processing Memorandum No. 10).

- (9) Municipal Provider. If an application for transfer proposes to change the nature of use of a water right to municipal purposes in the name of a municipal provider for reasonably anticipated future needs, the applicant must provide documentation to establish its qualifications as a municipal provider as defined in Section 42-202B, *Idaho Code*.
- (10) Agreement not to Divert. The applicant must describe any agreement or commitment not to divert water under the right(s) proposed for transfer such as a lease to the water supply bank (WSB), enrollment in the federal Conservation Reserve Enhancement Program (CREP) or dedication of the right for mitigation purposes.

5b. Evaluation of Water Right Validity.

For any application for transfer, the department must determine the validity of the water right(s), or part thereof, proposed to be changed. The following factors must be considered when processing an application for transfer and may require additional information from the applicant.

- (1) Department Records. For any application for transfer, the department must determine that a right, or part thereof, proposed to be transferred is valid and has not been lost by forfeiture or partial forfeiture. The department will presume, absent other information indicating forfeiture, that the right has not been forfeited if the department's water measurement records, aerial photography, remote sensing, or other information, shows use of water during the previous, consecutive, five-year period. The department will also presume that the right has not been forfeited when it is claimed in a pending adjudication or initially decreed in an adjudication within the previous five-year period. If staff makes a field inspection (all transfers seeking a change to a right evidenced only by a claim are to be field inspected or otherwise reviewed, see Transfer Processing Memorandum No. 1 as revised in Section 5b.(4) below), information must be gathered concerning the current status of diversion and delivery facilities and the apparent recent use of water.
- (2) Other Acceptable Documentation. If the records available to the department do not establish that a right has been used within the previous, consecutive, five-year period (except as provided in (1) above or for a right held by a municipal provider for reasonably anticipated

future needs pursuant to Section 42-223(2), *Idaho Code*), the applicant must be asked to provide written documentation demonstrating that the right has been used within that time period. Examples of appropriate documentation include power records for pumps used to divert water under the right, Farm Service Agency (FSA) crop production records, receipts or other evidence of expenditures or revenue from the use of water under the right, and adequate affidavits of objective persons having actual knowledge of the uses of water under the right. Alternatively, if the right has not been used within the previous, consecutive, five-year period, then the applicant must be asked to provide information showing that exceptions or defenses to forfeiture are applicable. Exceptions or defenses to forfeiture include those set forth in Section 42-223, *Idaho Code*; extensions provided for in Section 42-222, *Idaho Code*; and case law relating to factors such as resumption of use, unavailability of water when needed, or non-use when other water is available. Note that filing an application for transfer does not toll the statutory period for forfeiture of a water right due to non-use.

- (3) Validity of Unchanged Parts of a Water Right. For applications for transfer proposing to change part of a water right or rights, the remaining part(s) of the right(s) that are not involved in the proposed transfer are subject to a finding of forfeiture as part of the transfer action by the department. However, department staff is not required to perform a comprehensive forfeiture analysis for the remaining part(s) of the right(s), unless the information submitted by the applicant or gathered by the department clearly shows that forfeiture of the remaining part(s) has occurred. In addition, the remaining part(s) of the right(s) are not subject to any additional conditions beyond the requirements of the original right(s). When there has not been a comprehensive forfeiture analysis performed for the remaining, unchanged part(s) of the right(s), a remark will be included for any remaining part(s) of the right(s) to indicate that an approved transfer does not confirm the validity of the remaining, unchanged part(s) of the right(s).
- (4) Statutory or Beneficial Use Claims. Applications for transfer proposing to change a water right based on a statutory or beneficial use claim must be reviewed to determine the validity, priority date and extent of beneficial use established under of the claimed right. Review must include field verification or other means to verify the right. This memo effectively revises the means of verification as required in Transfer Processing Memorandum No. 1. In addition, the applicant must be asked to provide information confirming the priority date of the claim. Adjudication staff must also be consulted for questions regarding review of the priority date if the claim is filed in a pending adjudication. A transfer approval for the water right (or part thereof) based on a claim

shall incorporate the department's findings regarding the validity of the right. If a statutory or beneficial use claim is the basis for a pending claim in an adjudication, adjudication staff shall be notified of the results of the validity review, and the claimant shall be informed of the findings.

5c. Injury to Other Water Rights

For any application for transfer, the department must determine whether the proposed change will injure any other rights, whether junior or senior in priority to the right being changed. The following factors must be considered when processing a transfer and may require additional information from the applicant.

- (1) Reduction in Quantity of Water Available to Other Water Rights. Whether the amount of water available under an existing water right, senior or junior in priority, will be reduced below the amount recorded by permit, license, decree, or valid claim, or the historical amount beneficially used by the right holder, whichever is less. Consideration of this factor may require an analysis of the timing and location of return flows both before and after a proposed change to determine if the change will reduce the supply available to other water rights.

- (2) Unreasonable Effort or Expense. Whether the holder of an existing water right will be forced to an unreasonable effort or expense to divert water under the existing water right.

Existing ground water rights are subject to reasonable pumping level provisions of Section 42-226, *Idaho Code*, as well as applicable court decisions (e.g., *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), regarding in part the obligation to pay increased costs to divert an existing right).

- (3) Unusable Water Quality. Whether the quality of water available to the holder of an existing water right would be made unusable for the purposes of the existing right.
- (4) Mitigation. Whether mitigation would be needed to prevent injury to an existing water right that would be injured otherwise.

Unless agreed to in writing by the holder of an existing right, the only mitigation that can be considered acceptable by the department is the provision of replacement water in the full amount of the injury, at the same time injury would otherwise occur, and of acceptable water quality at the point of diversion for the existing right. For applications that propose to move the point of diversion for a water right to divert and use ground water from the ESPA, including any modeled tributary aquifers, the transfer is not approvable if the transfer would result in increased depletions, greater than 2 acre-feet per trimester, to any hydraulically-

connected reach of the Snake River, ~~within 5 percent for transient increases in depletion (reflecting the confidence intervals for the current ground water model).~~ When ~~greater~~ increases in such depletions would occur, acceptable mitigation includes reduction in the quantity of ground water diverted and depleted such that ~~any~~ there is no increase in depletions is, no greater than within 5 percent for transient or steady-state increases (reflecting the confidence intervals for the current ground water model), ~~for~~ any hydraulically-connected reach of the Snake River. When this form of mitigation is proposed, the quantity of ground water diverted may be increased periodically (no more frequently than annually) if supported by an analysis of the timing of calculated depletions (transient to steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA for the points of diversion both before and after the proposed transfer. However, the proposed schedule for increased diversions must be set forth in the application for transfer, ~~and if approved, the applicant may not increase ground water diversions under the transfer without first filing notice of intent to increase the annual diversion volume with the department each time an increase in diversion volume is sought.*~~

- (5) Ground Water Management Area or Critical Ground Water Area. Whether the point of diversion for a ground water right would move from outside the boundaries of a critical ground water area (CGWA) or ground water management area (GWMA) to within the boundaries of a CGWA or GWMA, or whether the point of diversion would move from within the boundaries of a GWMA to within the boundaries of a CGWA.

An application for transfer proposing such a change in the location of the point of diversion for a ground water right is not approvable unless the applicant proposes acceptable mitigation to prevent injury to other water rights. For cold water (~~less than 85° F or less~~) GWMAs over the ESPA, mitigation beyond that satisfying condition (4) above will not be required at this time as a condition of approval, unless injury would occur to a water right to divert ground water or injury would occur to a water right to divert surface water that has not been offset by stipulated agreement or through a mitigation plan approved by the ~~d~~Department,

- (6) Change of Source. Whether the source would be changed from ground water to surface water, or from surface water to ground water.

* If the transfer is approved with mitigation by reducing the amount of ground water withdrawn, and as a result the reach gains to one or more other hydraulically-connected reaches of the Snake River increase, then the applicant shall retain the right to receive credit for the increased reach gains. Such credits can not currently be used because there is no administrative system in place to recognize such credits. In the event that an administrative system is created in the future whereby such credits available at that time can be recognized, the applicant shall retain the right to the possible future use of such credits, which shall be reflected in a condition of approval for the transfer.

Section 42-222, Idaho Code does not provide for a change from a ground water to surface water source, or from a surface water to ground water source. An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day). The existing point of diversion and proposed point of diversion must be proximate such that diversion and use of water from the proposed point of diversion would have substantially the same effect on the hydraulically-connected source as diversion and use of water from the original point of diversion. If such application for transfer is approved, the changed water right shall be administered no differently than any other water right from the surface water source. If approved, the source for a change from a surface water source to a ground water source should be listed as ground water tributary to the surface water source.

- (7) Changing Aquifer Source. Whether a proposed change in point of diversion for a ground water right is from one aquifer to another aquifer.

An application for transfer proposing to change the point of diversion from one distinct aquifer to a totally separate aquifer is not approvable, just as an application for transfer proposing to change the point of diversion for a surface water right from one distinct surface water source to a totally separate surface water source is not approvable.

- (8) Conveyance Losses. Whether the proposed change would move part or all of a right from a canal impacting conveyance losses associated with the delivery of multiple water rights in the canal.

If such application for transfer is otherwise approvable, the approval must require that the applicant retain an appropriate amount of water in the canal to prevent any additional reduction in the amount of water available from the canal to fill other water rights because of the portion of the conveyance losses that, prior to the transfer, were attributable to the right being transferred.

Additional Considerations. In addition to the considerations above, the following information may be needed to evaluate injury involving an application for transfer for a ground water right, depending on the specific circumstances of the proposed transfer. If the information is not available in the department's records, the applicant must provide the following information that department staff determines is necessary:

- (1) Location of Nearby Wells. The location of the nearest production well, including domestic wells, to the proposed point of diversion, and if different, the nearest production well down gradient from the proposed

point of diversion (the location of other nearby production wells may also be required);

- (2) Location of Nearby Springs. The location of nearby springs from which water is diverted under existing rights, including domestic uses, that could be affected by ground water diversions from the proposed point of diversion;
- (3) Ground Water Levels. The depth to water, the stability of ground water levels, or the stability of confined aquifer pressures, in the area of the proposed point of diversion; and
- (4) Water-Bearing Zones. The depth and thickness of water-bearing zones, including identification of the zone or zones sought for the proposed use.

5d. Enlargement of Use

For any application for transfer, the department must determine whether the proposed change will enlarge the use of water under the water right(s). Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer. The following factors must be considered when processing an application for transfer, which may require that additional information be provided by the applicant:

- (1) Diversion Rate, Annual Diversion Volume, and Number of Acres Licensed or Decreed. The authorized diversion rate, annual diversion volume (ground water rights only and certain surface water rights), and number of acres authorized for irrigation (if applicable), as licensed or decreed for the water right, shall not be increased. If the annual diversion volume is not specifically stated on the license or decree for a ground water right, then the amount will be based on the most current standards adopted by the department.
- (2) Beneficial Use. An application for transfer proposing to change the place of use or nature of use for all or part of a water right or water rights, which change would not result in an equivalent reduction in beneficial use under the original right(s), will be presumed to enlarge the water right(s). For example, hydropower use cannot be added to a right used for irrigation, even though no additional water would be diverted for the hydropower use. The irrigation use, or part thereof, could be changed to hydropower use by reducing the irrigation use by an equivalent amount, or the new use could be provided without reducing the irrigation use by obtaining a new permit to appropriate water for hydropower use.

- (3) Stacked Water Rights. Water rights are “stacked” when two or more water rights, generally of different priorities and often from different sources, are used for the same use and overlies the same place of use. Water rights for irrigating a permissible place of use are not stacked when the water rights in total provide for irrigating up to the maximum acreage authorized within a permissible place of use. An application for transfer proposing to “unstack” one or more water rights used for irrigation or other use, without changing all the rights for the same use, is presumed to enlarge the water right. However, the place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies. In other words, use of the supplemental right at the proposed place of use can not materially exceed use of the supplemental right at the current place of use.

- (4) Changing Supplemental Right to Primary Water Right. A supplemental irrigation right authorizes the diversion of water for irrigation from a secondary source to provide a full supply for crops when used in combination with a primary right. A supplemental right can provide additional water in conjunction with a primary source, or at times when the primary source is unavailable. The use of a supplemental right is dependent on the supply available under the associated primary right and can be highly variable from year to year. An application for transfer proposing to change a supplemental irrigation right to a use as a primary water right for irrigation or other use will be presumed to enlarge the supplemental right—constitutes an enlargement. An exception is when the applicant can clearly demonstrate, using historic diversion records for the supplemental right as described in (5) below, that there would be no enlargement of the water right being changed or other related water rights because the supplemental right has been used on a regular basis (used more than 50 percent of the time) and the volume of water contributed annually from the supplemental right is known. Insufficient data will be grounds to reject the application because the department will not be able to ascertain if enlargement of the right will occur.

If an application proposes to change only a portion of a supplemental irrigation right to a use as a primary water right, the application is not approvable unless—and the extent of beneficial use under all associated rights prior to the transfer will be proportionately reduced or transferred to another place of use to avoid enlargement of the remaining portion of the supplemental right. The associated right(s) will not need to be reduced if the entire supplemental right will be changed through the transfer.

(5) (5) Historic Beneficial Use. For an application for transfer seeking to change the nature or purpose of use, or season of use, including or for a supplemental water right, the place of use, the historic extent of beneficial use under the right must not be enlarged. The extent of historic beneficial use may also have to be considered for other proposed changes in the place of use under some circumstances when there are other sources of water, such as natural subirrigation, even when the purpose of use or period of use are not proposed to be changed. For a transfer seeking to change a water right for irrigation, the consumptive water use based on the cropping pattern or rotation, or estimated from records of water diverted and system efficiency, for the most recent, five consecutive years is presumed to provide a reasonable basis to establish historic use under the water right proposed for transfer, unless information provided by the applicant supports using a longer historic period. Exceptions or defenses to forfeiture may also justify extending the time period considered in establishing the historic use prior to the proposed transfer. The highest-year historic consumptive use (i.e. highest-use crop rotation using a climatic average for crop water use estimates), except for supplemental rights, will be the basis for the annual volume of consumptive use available for transfer. When it is necessary to determine the historic consumptive use under a supplemental right, the average annual historic consumptive use, over an appropriately representative time period not less than five years but that may require be greater than five years, will be the basis for the volume available for transfer. For supplemental irrigation rights, a representative time period will include years with both good and bad surface water supplies for the area. In some rare instances, the diversion rate, the annual diversion volume, and season of use could also be limited based on the extent of historic use.

For an application for transfer seeking to change the place of use under a supplemental water right for use in conjunction with a different primary right, the historic extent of beneficial use under the right must not be enlarged. For such changes, information regarding the historic availability or reliability of supply of the rights being supplemented, both before and after the proposed change, is presumed to provide a reasonable basis to establish historic use under the supplemental right proposed for transfer.

(6) Period of Use. An application for transfer, which proposes an increased period of use in connection with a changed nature of use for ground water, is presumed not to be an enlargement in use if the rate of diversion, total annual volume diverted, and annual volume of

consumptive use are not increased. However, a change to an increased period of use for a surface water right is presumed to be an enlargement and would cause injury where there are junior priority rights that rely on surface water during the time period outside of the historic period of use for the right proposed to be changed.

- (7) Confined Animal Feeding Operations. For the purpose of quantifying the amount of water needed or used in connection with a confined animal feeding operation, such as a feedlot or dairy, the water use will be considered fully (100 percent) consumptive.
- (8) Fish Propagation. An application for transfer, which proposes to increase the number or volume of raceways in a fish propagation facility, will not be presumed to be an enlargement of the water right, unless the diversion rate or annual volume of water diverted are proposed to be increased.
- (9) Disposal of Waste Water. An application for transfer filed to provide for the disposal of wastewater, by land application on cultivated fields or other beneficial use disposing of the wastewater, resulting from use of water under non-irrigation uses such as a dairy or other confined animal feeding operation industrial, dairy, commercial, or municipal, or "industrial" water rights where the use of water is considered to be fully consumptive, is not considered an enlargement of the commercial, municipal, or industrial water right. While not an enlargement of the water right, such use of wastewater must not injure other water rights (see Application Processing Memorandum No. 61 as revised under Section 1 of this memorandum) and must comply with best management practices required by the Idaho Department of Environmental Quality, the U. S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction.
- (10) Enhanced Water Supply. An application for transfer, which proposes to change a point of diversion from a surface water source to a new location where the water available is greater or more reliable, such as moving from the tributary of a stream downstream to the mainstem of the stream, is presumed to enlarge the water right, unless the proposed change is subject to conditions limiting diversion of water at the proposed new point of diversion to times when water is available and the water right is in priority at the original point of diversion.
- (11) Water Held for Reasonably Anticipated Future Needs. Section 42-222, *Idaho Code*, provides that when a water right, or part thereof, to be changed is held by a municipal provider for municipal purposes, that portion of the right held for reasonably anticipated future needs can not be changed to a new place of use outside the service area of the

municipal provider or to a new nature of use. See Section 42-202B, *Idaho Code* for applicable definitions related to municipal water use.

- (12) Changing the Purpose of Use for a Water Right to Municipal Purposes. An application for transfer, which proposes to convey an established water right to a municipal provider and change the nature of use to municipal purposes, as defined in Section 42-202B, *Idaho Code*, shall not be approved without limiting the volume of water divertible under the right to the historic consumptive use under the water right prior to the proposed change. If the proposed transfer involves a surface water right, the transfer shall not be approved without also limiting the right to the historic period of use under the right prior to the proposed change.
- (13) Historic Use Recognized for Municipal Purposes. An application for transfer, which proposes to change the nature of use to municipal purposes for an established water right held by a municipal provider that lists the purpose(s) of use as some combination of domestic, commercial, industrial, or irrigation, or any combination of these uses, where those uses have historically been essentially for municipal purposes, as defined in Section 42-202B, *Idaho Code*, will not be presumed to be an enlargement of the right and will not require limitation to the historic consumptive use under the right. However, the change will be subject to the annual diversion volume, if specifically stated on the water right license or decree.
- (14) Stored Water. Section 42-222(1), *Idaho Code*, provides that a transfer of a water right for the use of stored water for irrigation purposes does not constitute an enlargement in the use of the original water right, even when more acres are irrigated, provided that no other water rights are injured.
- (15) Conveyance Losses. An application for transfer, which proposes to change the purpose of use for a portion of a water right covering conveyance losses to a use that would provide for irrigating additional acres, or other additional use, is presumed to be an enlargement of the water right.
- (16) Measuring Requirements for Ground Water Diversions in the ESPA and Modeled Tributaries. Any water right transfer authorizing one or more changes to the diversion and use of ground water approved subsequent to the date of this memorandum shall include a condition of approval that requires the installation and maintenance of one or more measuring devices or means of measurement approved by the department. Until and unless changed pursuant to Section 42-701, *Idaho Code*, the following flow meter installation is required for the transferred right prior to diverting and using ground water under the transferred right:

- a. One or more magnetic flow meters shall be installed, as required by the department, having an accuracy of 0.5 percent of rate of flow for flow velocities between 0.1 and 33 ft/sec in pipe sizes up to 4 inches in diameter and for flow velocities between 0.1 and 20 ft/sec in pipe sizes greater than 4 inches in diameter;
- b. Each magnetic flow meter must be installed and maintained in accordance with the manufacture's specifications and equipped with an LCD backlit display unit that displays instantaneous flow rate and total volume of water diverted in accordance with the department's requirements;
- c. Each magnetic flow meter must provide analog output for flow rate, scaled pulse frequency for total volume of water diverted, and an RS232 port for communications; and
- d. Each magnetic flow meter must be equipped with a data logger specified by the department and capable of storing 120 days of data including dates and cumulative volume of ground water diverted updated daily, as a minimum.

Detailed specifications for the above requirements will be provided by the Water Distribution Section of the department upon request. A municipal provider subject to other measurement provisions that satisfy the department's measuring and reporting requirements are exempt from the above condition. Wells for domestic use as defined under Section 42-111, Idaho Code or stockwater use under Section 42-1401A, Idaho Code are also exempt from the above condition. Wells used for domestic and/or stockwater in addition to any other purpose (e.g. commercial use) are not exempt from the above condition. Holders of ground water rights approved for transfer for diversion through existing systems or for irrigation systems may request a variance from the above requirements, which may or may not be granted. Transfer applicants may also request a variance from the above requirements during review of the application, prior to approval.

5e. Local Public Interest

For any application for transfer, the department must consider whether the proposed change(s) are in the local public interest as defined in Section 42-202B(3)3A(5), *Idaho Code*. Consistent with earlier guidance herein regarding use of discretion and sound judgement, department staff are to address pertinent items from the following list items, as well as other issues that are pertinent to specific circumstances, in considering whether sufficient information has been provided regarding local public interest issues and effects on the public water resource. When there are one or more significant

questions about whether a particular transfer would be in the local public interest, additional information from the applicant or comments from other state or local governmental entities that have germane expertise on local public interest issues must be sought. In most cases, the applicant should gather the information and submit it to the department rather than department staff sending a form letter to other agencies seeking comment, unless the local agency requests direct contact with the department. Staff should inform the applicant of their responsibility to provide the information to the department. — ~~The applicant shall be informed when written comments regarding an application are solicited or received from another agency.~~

~~(1) Economic Impacts.~~ The positive and negative impacts the proposed transfer could have on the economy of the local area, indicated by changes in short-term and long-term employment, short-term and long-term changes in economic activity, and the stability of economic activity;

~~(2)(1) Recreation, Fish, and Wildlife Impacts.~~ The effect the proposed transfer could have on the public water resource in relation to recreation, fish, and wildlife resources in the local area that would be affected by the proposed change (Transfer Processing Memoranda Nos. 19 and 21 provide guidance related to state protected river reaches and minimum stream flow reaches);

~~(3) Agricultural Base.~~ The effect the proposed transfer could have on the agricultural base of the local area (Section 42-222(1), *Idaho Code*, provides that a change in nature of use from agricultural use shall not be approved if it would significantly affect the agricultural base of the local area);

~~(4)(2) Air, Water, and Hazardous Substance Standards.~~ Whether the proposed transfer would comply with applicable air, water, and hazardous substance standards designed to protect the public water resource;

~~(5)(3) Local and State Requirements.~~ Whether the proposed transfer would comply with local government and state government, if any, planning and zoning ordinances, regulations, and records of decisions, or policies related to the public water resource (e.g. requirement of a local government to use surface water for irrigation for developments involving land use changes pursuant to Section 67-6537, *Idaho Code* is considered an expression of local public interest);

~~(6)(4) Neighboring Jurisdictions.~~ Whether the proposed transfer would comply with existing requirements for land use and other uses of natural resources related to the public water resource, if any, adjacent to the place of use proposed by the transfer but beyond the jurisdiction of the local government having authority or control over the proposed place of use; and

(7)(5) State Water Plan. Whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan pertaining to the local public interest.

5f. Beneficial Use and Conservation of Water Resources

For any application for transfer, the department must consider whether the proposed use of water is a beneficial use consistent with the conservation of water resources within the State of Idaho. The following factors must be considered when processing a transfer and may require additional information from the applicant:

- (1) Efficiency of Diversion and Use. Whether the water delivery and distribution/application systems for the use proposed by the transfer would be consistent with contemporary standards for reasonably efficient use of water.
- (2) Diversion Rates for Irrigation Use. Whether the proposed transfer, if involving irrigation, proposes a diversion rate in excess of 0.02 cfs per acre of land irrigated (see Section 42-220, *Idaho Code*), and if the application for transfer proposes a higher diversion rate, whether the higher rate would be justified based on soils, crop types, irrigation system, climate, and reasonable conveyance losses from the point of diversion to the place of use. A higher diversion rate may also be justified for irrigating lands that because of public access can only be irrigated during certain times of the day –(see Application Processing Memorandum No. 60). For the irrigation of five acres or less, justification is not necessary for a diversion rate of up to 0.03 cfs per acre (see Application Processing Memorandum No. 17). If the right proposed for transfer is based on a decree or license authorizing a diversion rate greater than 0.02 cfs per acre, then additional justification is not necessary unless:
 - a. The proposed transfer would change the place of use to a new place of use, rather than simply rearranging acreage at the general location of the existing place of use;
 - b. The proposed transfer would change the point of diversion with the intent to abandon the existing conveyance system and replace it with a new conveyance system that would reduce conveyance losses; or
 - c. The proposed transfer would add additional rights to an existing place of use from the same source as the existing water right(s) at the place of use.

- (3) State Water Plan. Whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan pertaining to beneficial use and conservation of water resources.

5g. Effect on Economy of Local Area

In the case where the proposed place of use is outside of the watershed or local area where the source of water originates, the department must consider the negative impacts the proposed transfer could have on the economy of the watershed or local area. The economic effect of the proposed transfer should be measured by assessing the following factors resulting from the change in use of water:

- (1) Changes in Employment. Estimated changes in current and projected short-term and long-term employment;
- (2) Changes in Economic Activity. Estimated changes to short-term and long-term changes in economic activity; and
- (3) Stability of Economic Activity.

5h. Effect on Agricultural Base of the Local Area

Section 42-222(1), Idaho Code, provides that a change in nature of use from agricultural use shall not be approved if it would significantly affect the agricultural base of the local area. Department staff should presume the phrase "change in nature of use from agricultural use" can only be significant if the application for transfer proposes a change in nature of use for irrigation rights. Other water rights may authorize use in a process that is related to agriculture, such as commercial use for a dairy or an industrial use for a potato processing plant, but these uses are usually small enough compared to irrigation uses that a proposed change in these uses is presumed to not be significant. It is possible that a change in nature of use of a fish propagation water right authorizing diversion of a large flow rate might invoke this provision if fish propagation is interpreted to be an agricultural use.

The boundaries of the "local area" may be determined by considering one or any combination of the following:

- (1) the boundaries of local government or the combined boundaries of local governments that cooperatively share plans for transportation, recreation, environmental quality, and similar water uses;
- (2) the boundaries of any taxing entities or districts created, including school districts, that rely directly upon tax receipts for businesses that might be affected by a reduction in agricultural production;

- (3) areas of common socio-economic values and operations, including those created by a) water delivery entities, b) similar agricultural crops grown, or c) the areas where agricultural processing facilities derive the agricultural products processed, or;
- (4) natural geographic features that separate various areas, particularly hydrologic basin separations.

Whether the change would significantly affect the local agricultural base may be determined by considering one or any of the following factors:

- (1) Financial Impacts on Local Governments. The financial impact the change will have on local governments, combinations of local governments, taxing entities, or districts within the local area that derived income from the agricultural use;
- (2) Financial Impacts on Others. The financial impact the change will have on water delivery entities, the ability of farmers to continue to grow and harvest the crops previously grown, and the ability of processors of agricultural products to obtain the products necessary for business viability;
- (3) Agricultural Job Displacement. The degree to which those working in agriculture will be displaced or will lose income resulting from the proposed change;
- (4) Agrarian Lands. The degree to which agrarian lands are taken out of production; or
- (5) Financial Impact on Overall Economy. The financial impact on the overall agricultural economy of a local area.

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